

## REVIEWS

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THE LAW OF TORTS. By Fowler Harper and Fleming James, Jr. Boston: Little Brown & Co., 1956. 3 Volumes, pp. xxv, 2062. \$60.00.

THIS publication by two Yale law professors who have been in the forefront of the writers on torts is a notable event. No other modern book covers in such detail and with such extensive citations the entire field of torts, and this one will undoubtedly find its place as a most useful tool, both in law offices and in law schools.

The first volume consists of what the authors call "Intended Torts," including the trespasses, conversion, defamation, malicious prosecution, interference with privacy, deceit and interference with business relations. The many cases cited and the many extracts from judicial opinions give a correct picture of the law and the divergence of authority, but there is comparatively little critical comment. The volume follows the *Restatement* analysis by putting the privileges after each tort, a permissible arrangement but one which leads to considerable duplication in the chapters dealing with trespasses. The matter of nuisance is included among the trespasses, which I think is desirable, but the organization of the two books requires omission here of negligent nuisance, which is not so happy.

The criticisms which follow are not intended to reflect upon the value of this volume as an attorney's tool. But there are a few shortcomings which may affect its use by beginning students, whose education requires great care in the use of language. The title of the volume, *Intended Torts*, is susceptible of misunderstanding. The useless and at times misleading distinction made in the *Restatement of Torts* between "assent" and "consent" has been retained.<sup>1</sup> There is no discussion of the distinction between consent and its manifestation. In the use of the word "possession" it is not clear whether the writer has in mind factual situations or the legal relation.<sup>2</sup> The phrase "volitional act"<sup>3</sup> is tautological, as is "affirmative act"<sup>4</sup> and "overt act."<sup>5</sup>

The material on trespasses to the person does not stress the fact that today these actions are of importance only because harm is unnecessary. The statement that for an assault there must be a physical movement<sup>6</sup> adopts the language of some of the opinions rather than stating what I believe to be the effect of the cases, that is, that any conduct causing anticipation of a substantially immediate impact is sufficient. Inevitable accident is stated to be a defense<sup>7</sup> and

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1. P. 233.

2. P. 5.

3. P. 12.

4. P. 39.

5. P. 124.

6. P. 222.

7. P. 219.

consent is treated as a privilege,<sup>8</sup> although it is part of the plaintiff's case to deny the existence of either.

In dealing with nuisance, the authors adopt the *Restatement* analysis,<sup>9</sup> but they include within the category of strict liability those situations in which the defendant, although knowing the physical results, believes that his conduct is not tortious. In fact, in such cases, the defendant intends the result, and unlike the situations involving strict liability, he is liable because his conduct is wrongful.

The chapter on deceit, which adopts in large measure the approach of the *Restatement of Torts*, does not seem to me to be sufficiently clear in outline. Among other difficulties, it does not make clear the peculiar problems involved in estoppel,<sup>10</sup> which, in its sporadic operation, runs counter to some of the fundamental ideas implicit in the action of deceit. On the other hand, I agree with the authors' criticism of the language of courts which profess to find fraud in innocent statements when made as of a party's own knowledge,<sup>11</sup> and the authors' treatment of promises and prophecies<sup>12</sup> is also sound. The entire chapter, however, does not, I believe, give sufficient emphasis to current progress.

The last chapter, dealing with interference with business relations, covers interference with contracts but omits unfair competition and labor law. These omissions are probably desirable, since today these matters are generally taken up in separate courses and separate treatises.

The second volume, labeled *Accidents*, but perhaps better entitled *Liability for Unintended Physical Consequences*, is a work properly distinguishing between legal fault, moral fault and no fault. It includes a masterly presentation of the negligence problems, and is one which every instructor in torts should read with the greatest care. In it are discussed not only the cases which indicate the growth and present condition of the law, but also the enormous mass of writings called forth by the intriguing nature of the subject. The authors advance, in season and out, their conviction that strict liability represents, and should represent, the wave of the future. But in doing so they have not twisted the facts of the cases, nor, in general, used disparaging adjectives rather than logic in supporting their cause. Thus, the cases on strict liability give a faithful picture of the decisions, in which the limitation of liability to the risks created by the defendant's conduct is similar to the limitations in the negligence field. Taking *Fletcher v. Rylands*<sup>13</sup> as a point of departure, the authors indicate the change in the application of this doctrine to extra-hazardous activities in this country, and follow this with a discussion of the important American cases.<sup>14</sup>

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8. P. 232.

9. P. 68.

10. P. 543.

11. P. 552.

12. P. 570.

13. 3 Hurl. & C. 774, 159 Eng. Rep. 737 (Ex. 1865), *rev'd*, L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (1868).

14. Pp. 788-870.

In the chapter on the nature of negligence, the authors point out, with many illustrations, that negligence is conduct and not a state of mind. They then deal with the attributes of the fictional reasonable man, and the factors determining whether a party has departed from the standard. I like the handling of wantonness, which I agree should be based upon an objective standard.

Under the heading of specific standards of conduct, the authors consider the functions of the jury, the court and the legislature in fixing standards. As we might expect, they do not like fixed standards, since these tend to restrict liability. I was somewhat disappointed at the brevity of the discussion of "duty of affirmative action,"<sup>15</sup> but what is said is sound.

Res ipsa loquitur is properly minimized as a distinct rule, but it was not surprising that the anomalous rule of *Ybarra v. Spangard*<sup>16</sup> is used as an argument for strict liability.<sup>17</sup> In dealing with legal cause, the authors adopt the Cardozo view of risk as a defining and limiting element, and say that, although this view does not approximate certainty in forecasting its result, it comes closer to predictability than any other suggested formula.<sup>18</sup> The only matter I miss is a discussion of the changes in risk following a tortious impact, as where a defendant's act, under identical circumstances, in one case throws the plaintiff upon the road and in another throws him upon the sidewalk. These changes in risk seem to be an important part of the picture of "legal cause." Finally, assumption of risk<sup>19</sup> is properly distinguished from contributory negligence, with which it has frequently been confused.

The authors' desire to compensate the injured person's harm leads them not only to say that contributory negligence is a "Draconian rule sired by a medieval concept of cause out of a heartless laissez-faire,"<sup>20</sup> but also causes them to support the results of the last clear chance rule, even while recognizing its illogical character.<sup>21</sup> Further, the authors oppose contribution among tortfeasors, since this causes plaintiffs more difficulty.<sup>22</sup> They oppose even more strongly the doctrine of comparative negligence in cases where multiple participants harm each other, since it tends to relieve insurance companies from some of their liability.<sup>23</sup>

Again, as we might expect, in dealing with employers' liability, the authors would allow recovery against a master by an injured hitchhiker invited to ride by an unauthorized servant,<sup>24</sup> and they are glad to note, correctly, that courts are enlarging the area of the employer's liability to third persons. The remaining chapters on the liability of landowners and suppliers maintain the high standard of the earlier chapters, and the same tendency to urge strict liability.

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15. Pp. 1044-53.

16. 25 Cal. 2d 486, 154 P.2d 687 (1944).

17. P. 1088.

18. Pp. 1151-61.

19. Pp. 1162-92.

20. P. 1207.

21. P. 1255.

22. P. 717.

23. P. 1239.

24. P. 1388.

As to strict liability: The time consumed by the courts in negligence cases, the element of chance in securing compensation, the swollen verdicts obtained by some of the expert operators, and the very real need of protection to persons made indigent by disaster, may cause a profound change in the rules. To carry the authors' ideas to a logical conclusion, each person or household should be required to be insured against all forms of disaster. There is the same economic loss whether harm is caused by slipping in a bath tub or being run over by a negligent or non-negligent driver. The premium could be collected as a tax; as in social security, the amount of the tax and the compensation could be adjusted to income. Surely the state is the best "spreader of the loss." Such an approach would eliminate waste in the court room and elsewhere even more than do Workmen's Compensation Acts. Without advocating such a system, I think it is preferable to one of strict liability, which has many difficulties that have not been sufficiently explored to enable us to judge its workability. I do not subscribe to the idea that negligence as a factor in liability is passing nor that it should pass out, although I do agree that basing liability on legal fault does not substantially minimize the slaughter on the highway.

Again may I say that the reading of the book was interesting and educational. I suggest it for consideration and thought by all three branches of the legal profession.

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THE LAW OF ZONING. By James Metzenbaum. New York: Baker, Voorhis & Co., 2d ed., 1955. 3 Volumes, pp. xxix, 2531. \$35.00.

THE rise of zoning in the second decade of this century was a symptom not of urban progress but of urban decline. It followed a new emphasis on "efficiency" in city administration and a new contempt for beauty.<sup>1</sup> Even within the narrow compass of its potential usefulness, zoning has not been successful: in 1942 a study concluded that non-conforming uses were increasing rather than decreasing;<sup>2</sup> and given the wretched standards of enforcement generally prevailing,<sup>3</sup> it is unlikely that this trend has since been reversed.<sup>4</sup>

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1. TUNNARD & REED, *AMERICAN SKYLINE* 171, 172-73 (1956).

2. Comment, *Amortization of Property Uses not Conforming to Zoning Regulations*, 9 U. CHI. L. REV. 477, 479 (1942).

3. See, e.g., LEWIS, *A NEW ZONING PLAN FOR THE DISTRICT OF COLUMBIA* 6 (1957). A unique aspect of zoning lies in the fact that boards of zoning adjustment can grant variances and exceptions without showing the reasoning on which their decisions are based in published reports or opinions. Hence there is no need for consistency, lawyers have no means of analyzing the board's past policies, and "contacts" and "influence" are at a premium. See, e.g., Note, *Zoning Variances and Exceptions: The Philadelphia Experience*, 103 U. PA. L. REV. 516, 529, 533 (1955), which also comments on inadequate enforcement, *id.* at 552.

4. It is true that there has been a trend towards ordinances requiring the termination of non-conforming uses after a reasonable period of time, which have been upheld by the